

FEB 26 1990

JOSEPH F. SPANIOL,
CLERK

in the
Supreme Court
of the
United States

NO.

MARC SANFORD EASON,

Petitioner,

US.

RICHARD L. DUGGER, as Secretary
Department of Corrections, State of Florida,*Respondent.*

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT**

MICHAEL TARRE
2655 Le Jeune Road
Suite 1109
Coral Gables, Florida 33134
(305) 442-8255

and

JEFFERY P. RAFFLE
2655 Le Jeune Road
Suite 1109
Coral Gables, Florida 33134
(305) 448-1413

Counsel for Petitioner

4

5

6

7

QUESTIONS PRESENTED

I.

IS A CASE IN WHICH THE DEFENDANT IS CHARGED WITH FIRST DEGREE MURDER, A CAPITAL CRIME, BUT NOT FACING THE DEATH PENALTY, A "CAPITAL CASE" WITHIN THE MEANING OF *BECK V. ALABAMA* ENTITLING HIM TO A JURY INSTRUCTION ON THE LESSER INCLUDED OFFENSE OF SECOND DEGREE MURDER WHERE SUCH INSTRUCTION IS SUPPORTED BY THE EVIDENCE AND IS NOT WAIVED?

II

DOES DUE PROCESS ENTITLE A DEFENDANT IN A NON-CAPITAL CASE TO A JURY INSTRUCTION ON LESSER INCLUDED OFFENSES?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW...	i
TABLE OF CITATIONS	iii
OPINION BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISION INVOLVED	2
STATEMENT OF THE CASE.....	2
REASON FOR GRANTING THE WRIT.....	17
CONCLUSION	25
CERTIFICATE OF SERVICE	26
APPENDIX	App. 1

TABLE OF CITATIONS

Case	Page
<i>Beck v. Alabama</i> , 447 U.S. 625 (1980)	17, 18, 23, 24
<i>Eason v. State</i> , 421 So.2d 35 (Fla. 3d DCA 1982).....	3
<i>Eason v. State</i> , 480 So.2d 1313 (Fla. 3d DCA 1985)	3
<i>Easter v. Estelle</i> , 609 F.2d 756 (5th Cir. 1980).....	23
<i>Harris v. State</i> , 438 So.2d 787 (Fla. 1983).....	23
<i>Hopper v. Evans</i> , 456 U.S. 605 (1982)	20
<i>Nichols v. Gagnon</i> , 710 F.2d 1267 (7th Cir. 1983).....	23, 24
<i>Perry v. Smith</i> , 810 F.2d 1078 (11th Cir. 1987)	23, 24
<i>Rembert v. Dugger</i> , 842 F.2d 301 (11th Cir. 1988); <i>cert. denied</i> , ____ U.S. ____, 109 S.Ct. 500 (1988)	3, 18, 19
<i>Richardson v. Johnson</i> , 864 F.2d 1536 (11th Cir. 1989)	20
<i>United States ex rel. Peery v. Sielaff</i> , 615 F.2d 402 (7th Cir. 1979).....	24

TABLE OF CITATIONS--Continued

Case	Page
OTHER AUTHORITIES	
28 U.S.C. §1254(1).....	2
28 U.S.C. §2101(c)	2
28 U.S.C. §2254.....	3
Rule 3.211(a), Florida Rules of Criminal Procedure.....	22
Rule 3.510, Florida Rules of Criminal Procedure.....	19
Fourteenth Amendment.....	2

in the
Supreme Court
of the
United States

NO.

MARC SANFORD EASON,

Petitioner,
vs.

RICHARD L. DUGGER, as Secretary
Department of Corrections, State of Florida,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is an unreported *per curiam* affirmance of the order of the district court denying Eason's habeas corpus petition. It is attached as Appendix A to this petition.

JURISDICTION

The decision of the Court of Appeals was rendered on November 29, 1989. This petition has been filed within the time prescribed by 28 U.S.C. §2101(c). The jurisdiction of this Court is invoked under Title 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

FOURTEENTH AMENDMENT

... No State shall... deprive any person of life, liberty or property, without due process of law...

STATEMENT OF THE CASE

1. PROCEDURAL HISTORY

An indictment was filed on July 28, 1977, in the Circuit Court of the Eleventh Judicial Circuit of Florida charging the Petitioner with two counts of first degree murder. Trial proceedings commenced on September 5, 1979, and on September 12, 1979, the jury returned verdicts of guilty as charged as to each count. Petitioner was sentenced to life imprisonment (without parole eligibility for 25 years) on each count with the sentences running concurrently.¹

Petitioner appealed to the Third District Court of Appeal of Florida which on October 26, 1982 affirmed

¹Prior to trial the court granted the Petitioner's motion to preclude imposition of the death penalty.

the judgment and sentence. *Eason v. State*, 421 So.2d 35 (Fla. 3d DCA 1982).

A motion to vacate judgment and sentence was filed in the trial court on October 20, 1983, and summarily denied on October 15, 1984.

An appeal was taken to The Third District Court of Appeal which affirmed the trial court's order on December 10, 1985, *Eason v. State*, 480 So.2d 1313 (Fla. 3d DCA 1985), and denied a motion for rehearing on January 15, 1986.

Eason's petition under 28 U.S.C. §2254 for writ of habeas corpus by a person in state custody was filed in United States District Court, Southern District of Florida on September 19, 1988, alleging (1) ineffective assistance of counsel in a waiver by counsel of a jury instruction on the lesser offense of second degree murder; and (2) denial of due process because the trial court failed to give the jury instruction on second degree murder. The United States magistrate on January 16, 1989 filed a report and recommendation which found that (1) trial counsel was not ineffective in failing to request an instruction on second degree murder; and (2) in a capital case the trial court was correct in failing to instruct the jury on second degree murder because Eason waived such an instruction. The district court, on February 22, 1989, issued its order adopting the report and denying Eason's petition, ruling that: (1) Eason made an express waiver of the instruction, and (2) even if the trial court should have given the instruction, the failure to do so was harmless error because Eason did not receive the death sentence, citing *Rembert v. Dugger*, 842 F.2d 301 (11th Cir. 1988).

Eason appealed to the United States Court of Appeals for the Eleventh Circuit which rendered an unpublished opinion on November 29, 1989, affirming the order of the district court.

2. TRIAL PROCEEDINGS

A. The Murders

The facts regarding the events of July 22, 23 and 24, 1977, are essentially undisputed.

On the night of Friday, July 22, 1977, Eason called the Miami Police Department emergency number demanding police assistance in removing the two tenants who shared his Miami duplex, Ronnie and Donna Fulks. When asked why he wanted them out, he told the operator that he "just might kill them. How does that strike you?" The operator's unfortunate reply, "Well I could care less that you tell them to leave, I want to know why you want the police," was a prelude to one of Dade County's most bizarre and publicized murders.

The following morning, July 23, 1977, two neighbors of Eason were awakened by the sound of a lawn mower and Ronnie Fulks's screams, "No Marc, don't." The neighbors saw Eason with a hatchet in his hand chopping at something on the ground. Eason then began mowing the lawn. He later was seen wrapping a body-sized object in a sheet and chains, putting it in the trunk of his car and hosing blood from his arms and chest. They reported the incident to the landlord, who called the police.

Later that day, Ronnie Fulks's nearly decapitated body was found floating in the water near Key Largo. Nearby was a plastic bag containing a pair of glasses and the victim's severed finger.

A police alert was put out for Eason and his car. On Sunday morning, July 24, 1977, Eason returned to the Coconut Grove apartment and was promptly arrested, transported to the Miami Police Department and advised of his rights. He was friendly, casual, matter-of-fact and cooperative, and he proceeded to give detectives a 25-page confession.

Eason stated that Ronnie Fulks had threatened him several times and that on Friday night Eason decided that Fulks "had to go" and that he "just had to be cold-blooded about the whole thing." On the morning of the killing, he "just walked up to him and did it," hitting Fulks once in the head causing him to fall and hitting him several more times: "... [T]he last time I hit him he was just barely moving and it's the kind of thing I just wanted to get done as fast as possible and the last time I hit him, I knew that was the last time because I crushed the whole back of his skull, so I know that was it." He stated he felt completely justified because Fulks had often threatened him. Eason also digressed several times during the confession to discuss his sore feet and the welfare of his dogs.

The detectives, who knew nothing at this time about Mrs. Fulks, then asked where she might be. Eason stated, "Hm mm," shaking his head affirmatively, "I killed her too ... she's probably

about—how deep is the water in the Card Sound bridge? . . . I'll tell you exactly where she is."

Eason told the detectives that late Friday night he choked Donna Fulks to death with his hands while she was asleep and later disposed of her body by throwing her into the water near Card Sound bridge. He said he murdered her because of his frustration over her fetish for household cleanliness.

Donna Fulks's body, nude, strangled and attached by a rope to a concrete block, was found on Sunday, July 24, 1977, floating near the bridge Eason had described. In another canal Eason led police to the ax. A search of Eason's home revealed that he owned virtually no clothing whatsoever.

B. Psychiatric Testimony

Dr. Philip Briley, a Maryland psychologist, testified that he had treated Eason in 1972 at St. Elizabeth's Hospital in Washington, D.C. following Eason's arrest by Secret Service agents for threatening the life of Vice President Spiro Agnew. Eason was arrested outside the White House having made statements that he wanted to punch Agnew in the mouth for starting a war and wanted to see Governor Reagan's blood run red. Briley further testified that Eason had previously been arrested at the Dallas airport where he had claimed he could fly anywhere in Europe free, did not need a ticket and refused to deplane. Eason also had been hospitalized at St. Elizabeth's on an earlier occasion in connection with an air piracy incident. Briley diagnosed Eason as suffering

a major psychosis in the nature of paranoid schizophrenia.

Dr. Miles Erickson, an Air Force Lt. Colonel and staff psychiatrist at Keesler Air Force Base in Mississippi, examined Eason at a private psychiatric hospital in Pontiac, Michigan in 1972, where he had been committed by the court. Erickson testified Eason suffered from chronic, undifferentiated schizophrenia, was overtly and dangerously mentally ill and legally insane in 1972.

Eason's mother testified to his disturbed childhood, his having slept with a hatchet in his bed in fear of intruders, and a 1973 incident in which he cut her throat from ear to ear.

Dr. David Shapiro, a clinical psychiatrist, examined Eason at the Ypsilanti State Hospital in Michigan following Eason's knife attack on his mother. Following the introduction of evidence of Eason's acquittal on grounds of insanity of the crime and readmission to the hospital, Shapiro testified that Eason was dramatically mentally ill, having a very unusual delusional system of ~~strange~~ beliefs that could not be challenged. He stated that Eason was convinced that his father had been killed by food which had been poisoned by his mother and that his mother had put something in his (Eason's) food and that was making him impotent. Eason further believed that his mother was trying to kill him. He testified that Eason had described his mother being in the same bed with his nephew at the time he stabbed her and that Eason described the attack on his mother as having sexual significance and as an "automatic reflex." On the issue

of premeditation, Shapiro was asked by Eason's trial counsel, "Did you ever differentiate or distinguish between the term that he used, automatic reflex, from this premeditated type of thinking or planning?" Shapiro responded:

Well, you see, I never really thought that it was in my opinion really premeditated because it was very apparent as he started describing it that there were so many very bizarre, sick, distorted ideas that led to it that if you wanted to call it premeditated or planned, in a sense, it is but the basis of the planning, though, is a series of very distorted sick ideas.²

Shapiro concluded that upon readmission to the hospital, Eason received daily a substantial dose, approximately 800 milligrams, of thorazine, a potent anti-psychotic medication. He testified that this was an extraordinarily high dosage. He also testified that among the over 2,000 patients that he had treated over the years that Eason was among the most severely ill he had ever examined.

Dr. Michael Gilbert, Dr. Regis Estrada, Dr. Joseph P. Lone and Dr. Ronald Shellow, all south Florida psychiatrists, testified that Eason suffered from paranoid schizophrenia, that he was delusional and hallucinatory, that his condition was extraordinarily

²Though it is more relevant to the ineffective assistance of counsel argument not raised in this petition but which was raised below, it should be noted that in addition to the presentation of expert testimony on the lack of Eason's capacity to form a premeditated intent to kill, trial counsel argued this point vigorously in both opening statement and closing argument.

severe, deep seated and long-standing, and that he was legally insane.

A full battery of psychological tests were administered by psychologists Dr. Norman Reichenberg and Dr. Frank Loeffler. Reichenberg testified that on the basis of these tests, he concluded that Eason suffered from an "enormous" mental disturbance, was frequently unable to control his thinking or behavior and was, to an extreme degree, a paranoid schizophrenic and legally insane. Loeffler's testimony was essentially the same and concluded with the observation that Eason's was one of the most severe cases of mental illness he had encountered in 25 years of practice.

The state called three psychiatrists, Dr. Sanford Jacobson, Dr. Arnold Eicherd and Dr. Albert Jaslow. They agreed that Eason was a highly disturbed paranoid schizophrenic, but knew what he was doing and knew right from wrong at the time of the killings.

C. Jury Instructions/Waiver of Instruction on Second Degree Murder

The trial court made a number of inquiries of defense counsel during the trial as to whether or not the defense was requesting jury instructions on lesser included offenses to first degree murder. Counsel's responses to these inquiries were either vague or non-responsive. The record reflects that Eason was never asked about this subject by the court and only once by his lawyer. Even then, Eason was not asked whether he understood that he had the right to have the jury consider the lesser offense of second degree murder, or

whether he waived such an instruction, or whether he understood the significance or consequences of such a decision.

At the close of the state's case-in-chief, the following discussion took place:

MR. KATZ (the prosecutor): Another matter which I think we can, perhaps, explore it now and that is the question of jury instructions. The rules require that the jury instructions that are read to the jury be given to them in writing. Generally, I know the Court relies [sic] upon the State to prepare the written format to be delivered to the jury for their deliberations. I was wondering if the Court could consider, at least presently, going through the charge conference sometime during the procedure today so that I can get my office—

THE COURT: You have today. You do not have any prepared. I'm going to use the standard jury instructions.

* * *

THE COURT: (to Eason's counsel): Do you anticipate not instructing on any of the degrees of homicide?

MS. GURALNICK: (defense counsel): I don't think that would be necessary. I agree.

MR. KATZ: You're not asking for any lesser included instructions?

MS. GURALNICK: Most important thing that I had a chance to review and I would be happy to go over it with you—

* * *

MS. GURALNICK: I just want to make sure, to be careful nothing that was done before in the first trial—when he did not have a lawyer—was covered in these jury instructions.

MR. KATZ: You're not asking for any lesser includeds?

MS. GURALNICK: I want to be able to review these. Mr. Eason said he wanted to discuss these with me. I don't anticipate problems with these.

Near the close of the defense case:

MR. KATZ: Perhaps we could use this time to discuss some of the jury instructions.

THE COURT: Have you had an opportunity? He gave you copies of those.

MS. GURALNICK: I know he did. I reviewed them. I have not—

THE COURT: Let me see what you have, Counsel.

MS. GURALNICK: I just want to talk to Marc about them to explain and I just want to double check my exhibits.

MR. KATZ: Judge, this is as it was prepared for the first trial and insanity was not the issue so the insanity is the instruction I would have to have inserted and the instruction on justifiable homicide would have to be changed and we would also have to resolve whether or not the defense would be requesting lesser included charges.

THE COURT: Counsel already stipulated, didn't you, that the lesser included—

MS. GURALNICK: I'm going to discuss that with Mr. Eason and indicate—I want to explain what happened at the last trial and discuss before I make my final request to the Court.

* * *

THE COURT: Yes, as soon as we finish, unless counsel needs some time. It will give her an opportunity to discuss it with Mr. Eason and go over these and to see if she has any objections to them. If she has no objection to the charge conference, it would be very brief.

Finally, prior to closing arguments, during the formal "charge conference," the following discussion regarding lesser included offense instructions:

THE COURT: All right. Let's proceed. What were you going to say, Ms. Guralnick, concerning these?

MS. GURALNICK: I was just going to say that we're going to—after discussion, I think Marc understands everything we talked about and we agree that we do not want the lesser includeds.

THE COURT: You do not want the lesser includeds.

MS. GURALNICK: We wanted the instruction on insanity.

THE COURT: Let's go through these. Do you have a copy? Let's go through.

MS. GURALNICK: I have this package.

THE COURT: That is what I have. While they are not numbered as such, the first page, the general instruction, first two pages. Is that satisfactory?

MR. KATZ: On the bottom of the first page. The typing will eliminate from where it says each count.

THE COURT: Yes. Eliminate that.

MR. KATZ: Related to the lessers.

* * *

THE COURT: Ms. Guralnick, you agreed that that last paragraph on the first page—

MS. GURALNICK: Yes.

THE COURT: (Continuing)—will be eliminated? All right. Let's number these so that we'll—would you go through and number yours. Let's number all of them so that we'll be sure that we're talking about the same.

MS. GURALNICK: I would like the Court to compare these with—did you already?

THE COURT: I assume.

MR. KATZ: These were taken out of the standards.

MS. GURALNICK: I still think I want—I didn't have a chance to do that. I would like to have a little more time to think about this thing, about excluding the lessers. I would like to think about that a little bit longer. We'll come back to it at the end.

* * *

MS. GURALNICK: Okay, I just want to explain to him for a second what you just said.

(Counsel confers with her client after which the following proceedings were had.)

THE COURT: Ms. Guralnick, on page 68 of the standard, that is the entire page is satisfactory, down through page 69, the paragraph—you don't want that paragraph?

MS. GURALNICK: No.

THE COURT: Just the first paragraph on page 69, counsel, "if a person has premeditated to kill one person and actually kills another is none the less guilty."

MR. KATZ: They are asking—

THE COURT: No.

MR. KATZ: You're asking for that?

MS. GURALNICK: No.

THE COURT: You want the lesser?

MS. GURALNICK: No.

THE COURT: Eliminate the lesser.

MS. GURALNICK: I want the defense, but do not want the lessers we talked about. Just for the record, so we understand, we talked about the manslaughter and we discussed that idea. We think negligence does not apply in

this case. Is that right, Marc, you agree on that?

THE DEFENDANT: *Right.*

The trial transcript clearly shows that the trial court *never* inquired of Eason his understanding or awareness of the consequences of the abandonment of an instruction on second degree murder. When the court did inquire of trial counsel, she vacillated and gave vague and confusing responses to the inquiries about an instruction on lesser included offenses. Furthermore, the record here utterly fails to show that the presumptively insane Eason understood or personally waived such an instruction, let alone show that such waiver was intelligent, voluntary and an act of informed free will. Without instruction on the lesser included offense, Eason forfeited any chance of a verdict, supported by the evidence and argument of counsel of second degree murder, and with it, parole eligibility.

REASONS FOR GRANTING THE WRIT
THE DECISION BELOW PRESENTS TWO
IMPORTANT BUT UNANSWERED
QUESTIONS.

I

IS A CASE IN WHICH THE DEFENDANT IS CHARGED WITH FIRST DEGREE MURDER, A CAPITAL CRIME, BUT NOT FACING THE DEATH PENALTY, A "CAPITAL CASE" WITHIN THE MEANING OF *BECK V. ALABAMA* ENTITLING HIM TO A JURY INSTRUCTION ON THE LESSER INCLUDED OFFENSE OF SECOND DEGREE MURDER WHERE SUCH INSTRUCTION IS SUPPORTED BY THE EVIDENCE AND IS NOT WAIVED?

Beck v. Alabama, 447 U.S. 625 (1980) held that in a capital case, due process requires that a defendant receive jury instruction on lesser included offenses. *Beck* mandates that if the failure to give a lesser included offense instruction³ enhances the risk of an unwarranted conviction, the state is constitutionally prohibited from removing that option from jury consideration in a capital case. The Court reasoned that in a capital trial, the Due Process Clause requires instructions on lesser included offenses where the

³In Alabama, a statute forbade giving a lesser included offense instruction in a capital case regardless of the strength of the evidence supporting the lesser included offense.

evidence unquestionably establishes that the defendant is guilty of a serious, violent offense-but leaves some doubt with respect to an element that would justify conviction of a capital offense....

Beck, 447 U.S. at 637.

Beck failed to decide the issue of whether its holding extended to capital cases in which the defendant did not face or receive the death penalty. This issue was addressed by the Eleventh Circuit Court of Appeals in *Rembert v. Dugger*, 842 F.2d 301 (11th Cir. 1988); cert. denied, ____ U.S. ___, 109 S.Ct. 500 (1988), which held that *Beck* was concerned "with the need to safeguard against the arbitrary and capricious imposition of death sentences." *Rembert*, 842 F.2d at 303.

The court held that *Beck* applied only so long as the defendant faces the possibility of a death sentence and that Rembert's life sentence rendered harmless the acknowledged error.⁴ by the trial court in refusing to instruct on lesser included offenses. The court concluded that habeas corpus relief is not available to defendants in Rembert's posture.

⁴Rembert's efforts at trial to waive the statute of limitations for the lesser included offenses were erroneously denied by the trial court.

Eason's case, though procedurally different in some respects,⁶ is clearly controlled by *Rembert*. No other circuit court of appeals has addressed this issue and it therefore requires resolution by this Court. The necessity of Supreme Court review is established by two factors.

First, the life sentence imposed on Eason and Rembert, without the possibility of parole for 25 years, are the severest sentences possible, other than the death penalty, and apply to numerous individuals across the country. There seems little doubt that capital defendants receiving life sentences outnumber those receiving the death penalty.

Second, as in *Rembert*, Eason was denied a fair trial. The failure of the trial court to instruct on second degree murder, despite evidence to support the instruction and the absence of a valid waiver, was a denial of due process,⁷ prejudicial enough to warrant

⁶Eason strenuously denies he intelligently waived the instruction on second degree murder but did not, like Rembert, affirmatively request it. Eason's pretrial motion to preclude the imposition of the death penalty was granted whereas Rembert was sentenced to life based on a jury recommendation which the judge followed.

⁷The trial court's failure to instruct on second degree murder was incorrect under Florida law and violated Rule 3.510 Florida Rules of Criminal Procedure which, in 1979, provided:

Upon an indictment or information upon which the defendant is to be tried for any offense the jurors may convict the defendant of an attempt to commit such offense if such attempt is an offense, or may convict him of any offense which is necessarily included in the offense charged. The court *shall* charge the jury in this regard.

habeas corpus relief even though Eason does not face a death sentence.

On the issue of whether Eason could have been convicted of a lesser included offense, the test of *Hopper v. Evans*, 456 U.S. 605 (1982) is met. Evidence was presented upon which a second degree murder (lack of premeditation) conviction could have been based or an alternative theory to first degree murder offered. See *Richardson v. Johnson*, 864 F.2d 1536 (11th Cir. 1989).

Furthermore, Eason did not, as held by the district court, waive his right to the instruction. This position is supported by the following critical portion of the jury instruction conference, which is the only time during the jury instruction phase of the trial that Eason spoke:

THE COURT: You want the lesser?

MS. GURALNICK [trial counsel]: No.

THE COURT: Eliminate the lesser.

MS. GURALNICK: I want the defense, but do not want the lessers we talked about. Just for the record, so we understand, we talked about the manslaughter and we discussed that idea. We think negligence does not apply in this case. Is that right, Marc, you agree on that?

THE DEFENDANT: Right.

It is critical that *trial counsel, not Eason*, agreed to waive the lesser-included-offense of second degree murder. Eason's one word response, "right," was in direct reply to trial counsel's question regarding whether "manslaughter" and "negligence" applied in this case. Nowhere in this colloquy, or elsewhere in the trial record, is Eason ever told about his absolute right to an instruction on second degree murder; asked if he understood this right; or shown to have waived such an instruction.

This absence of an express, personal, intelligent and voluntary waiver by *Eason* of an instruction on second degree murder is at the core of his due process claim.

The decision below not only erroneously finds a waiver by Eason, but presumes "extensive consultation" between Eason and his counsel solely on the basis of counsel's statements that she wanted to discuss, or had discussed, the matter with Eason. In fact, the record does not show any acknowledgement by Eason that he had been consulted at all, let alone "extensively" by his counsel.

The decision below also places undue emphasis on Eason having been found competent to stand trial. Regarding the prior insanity adjudication in Michigan, Eason's Petition did not claim that he was presumptively incompetent to stand trial,⁷ but rather that he was presumptively insane at the time of the crime. This presumption, together with the extensive

⁷We concede that the pretrial competency finding was sufficient to remove this presumption.

expert testimony at trial concerning Eason's severe psychiatric problems, was, at the very least, highly suspect and an obvious "red flag" requiring at least *some* inquiry of Eason by his counsel or the court as to the understanding and waiver of his right to an instruction on second degree murder.

No inquiry of Eason, other than counsel's questions about "manslaughter" — "negligence," was made. Eason's one-word cryptic response, "right," was, if a waiver of anything, (and we do not concede that it was), only to his right to have the jury instructed on manslaughter, and under no interpretation could it be deemed a waiver of his right to an instruction for second degree murder.

A finding of competency to stand trial does not prove an understanding or intelligent waiver of the right to a jury instruction on a lesser offense, even in a defendant who had *not* previously been adjudicated insane. The issues of competency and waiver are fundamentally different.

Competency to stand trial in Florida requires only a showing of the defendant's ability to consult with his lawyer with a reasonable degree of rational understanding, and a factual understanding of the proceedings against him. Rule 3.211(a) Florida Rules of Criminal Procedure.

A much more stringent standard, however, must be met under Florida law to establish an effective waiver of the right to an instruction on lesser included offenses:

[T]here must be an express waiver of the right to these instructions by the defendant, and the record must reflect that it was knowingly and intelligently made.

Harris v. State, 438 So.2d 787 (Fla. 1983).

Eason did not, under any recognized standard in law, waive his constitutional right to an instruction on second degree murder.

II

DOES DUE PROCESS ENTITLE A DEFENDANT IN A NON-CAPITAL CASE TO A JURY INSTRUCTION ON LESSER INCLUDED OFFENSES?

Beck, supra, explicitly left open the question of whether due process requires jury instructions on lesser included offenses in non-capital cases. 447 U.S. at 638 n.14. *Nichols v. Gagnon*, 710 F.2d 1267 (7th Cir. 1983) and later *Perry v. Smith*, 810 F.2d 1078 (11th Cir. 1987), relying on the pre-*Beck* *Easter v. Estelle*, 609 F.2d 756 (5th Cir. 1980) answered the question in the negative holding that such instructions are not constitutionally required in non-capital cases.

If Eason's case is held to be non-capital within the meaning of *Beck*, it is controlled by *Perry v. Smith, supra*, which holds that the Due Process Clause does not require a state court to instruct on lesser included offenses. Clearly, no habeas corpus relief is available to him under such a construction.

But *Perry* is in conflict with *Nichols v. Gagnon, supra*, which does not entirely preclude habeas corpus review of erroneous state court denial of lesser included offense instructions, but adopts the pre-*Beck* standard of *United States ex rel. Peery v. Sielaff*, 615 F.2d 402 (7th Cir. 1979). That case held that an erroneous state court failure to instruct on lesser included offenses will not warrant habeas corpus relief unless "failure to give the instruction could be said to have amounted to a fundamental miscarriage of justice." *Id.* at 404.

Eason believes that habeas corpus relief should not be denied automatically to defendants in all non-capital cases, especially those in which the defendant is serving a life sentence without parole opportunity for the majority of his life.

Eason also maintains that the "fundamental miscarriage of justice standard" recognized by the Seventh Circuit Court of Appeals, while better than the complete absence of a remedy as is the case in the Eleventh Circuit, is too high and should be brought into line with *Beck v. Alabama*.

The conflict between *Perry* and *Nichols* requires a resolution of the issue by this Court.

CONCLUSION

Because the decision below presents important but unanswered questions, certiorari should be granted.

Respectfully submitted,

MICHAEL TARRE
2655 Le Jeune Road
Suite 1109
Coral Gables, Florida 33134
(305) 442-8255

and

JEFFERY P. RAFFLE
2655 Le Jeune Road
Suite 1109
Coral Gables, Florida 33134
(305) 448-1413

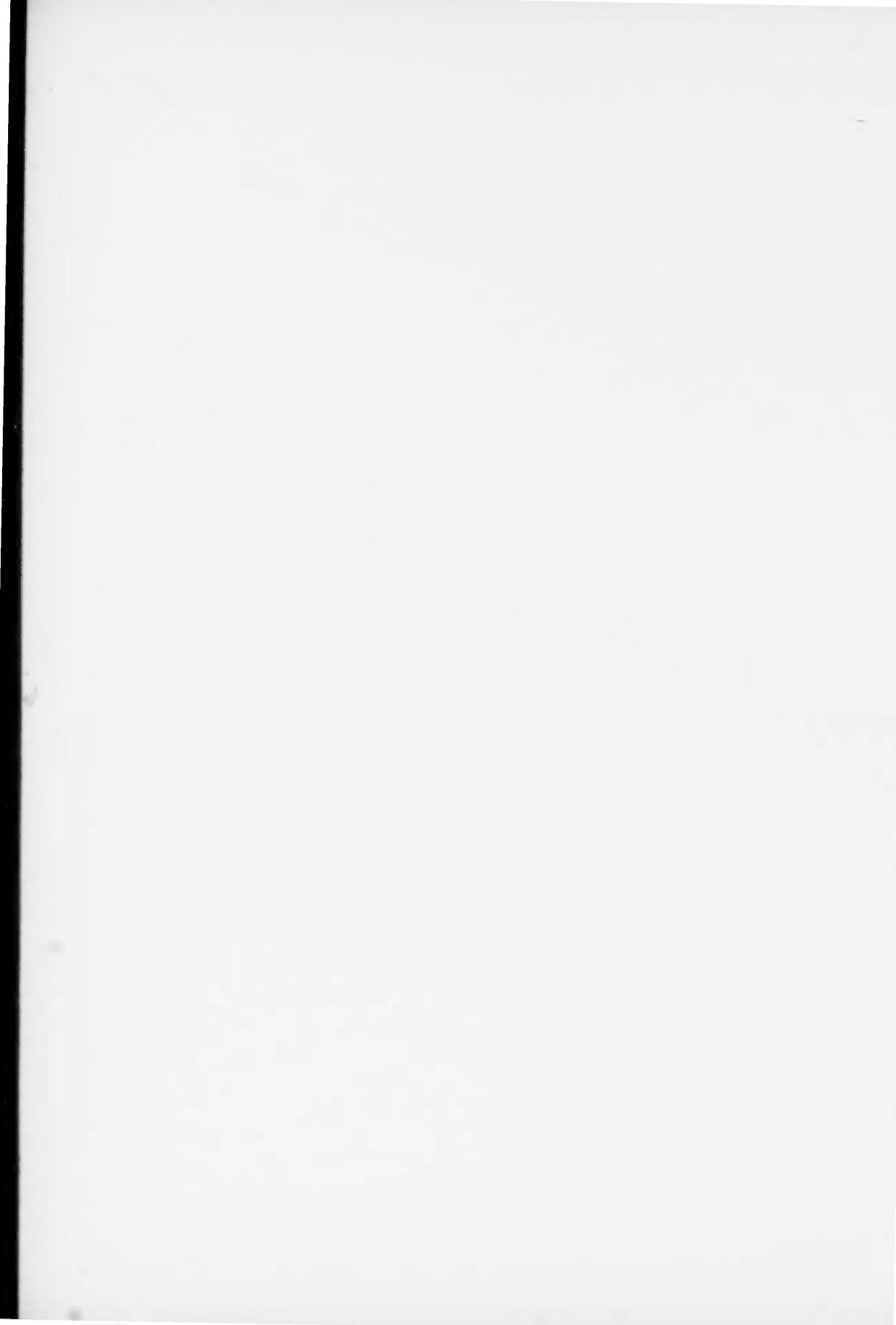
Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the day of February, 1990, a copy of the foregoing Petition for Certiorari was served by mail upon the Office of the Attorney General of Florida, 401 N.W. 2nd Avenue, Miami, Florida 33128.

JEFFERY P. RAFFLE

Appendix



IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 89-5299

D. C. Docket No. 88-1730-CIV-EBD

MARC SANFORD EASON,

Petitioner-Appellant,

versus

RICHARD L. DUGGER,

Respondent-Appellee.

**Appeal from the United States District Court
for the Southern District of Florida
(November 29, 1989)**

Before FAY and EDMONDSON, Circuit Judges, and
HALTOM*, District Judge.

PER CURIAM: AFFIRMED. See 11th Cir. Rule
36-1.

*Honorable E. B. Haltom, Jr., U.S. District Judge for
the Northern District of Alabama, sitting by
designation.

Judgment Entered: November 29, 1989
For the Court: Miguel J. Cortez, Clerk
By: /s/ Karleea McNabb
Deputy Clerk

ISSUED AS MANDATE: JAN 09 1990